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No. 86-107

IN THE

Supreme Court of the United States

OCTOBER TERM, 1986

MOBILE DODGE, INC.,

Appellant,

v.

DANNY R. ALFORD,

Appellee.

On Appeal From The Supreme Court Of Alabama

REPLY MEMORANDUM

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REPLY MEMORANDUM

In his Motion to Dismiss ("Motion"), appellee virtually concedes that the weight of authority brought to this Court's attention in appellant's Jurisdictional Statement ("Juris. Stat.") regarding the actual practice of the Supreme Court of Alabama of entertaining questions raised for the first time in an application for rehearing conclusively establishes this Court's jurisdiction over this case. Thus, appellee argues, Motion, at 24, that "notwithstanding" this Court's decisions in *Hathorn* v. *Lovorn*, 457 U.S. 255 (1982), "and like cases to the contrary," this Court has no jurisdiction over this case. But as appellant has previously demonstrated, Juris. Stat., at 7-15 & nn. 3, 7 & 8, the practice of the court below is so well established that appellee may prevail on his jurisdictional arguments only if *Hathorn* and many other cases in this Court are overruled. This reply memorandum will therefore be limited to responding to appellee's few arguments which attempt to distinguish this case from the situation presented in *Hathorn*.

A. The Practice of the Supreme Court of Alabama Regarding Questions Presented for the First Time in an Application for Rehearing

Appellee attempts, Motion, at 7-8, to establish that the Supreme Court of Alabama does not entertain questions raised for the first time in an application for rehearing by reliance on two cases in that court, *Kirkland* v. *Kirkland*, 281 Ala. 42, 198 So.2d 771 (1967), and *Lovett* v. *Uptain*, 450 So.2d 113 (Ala. Civ. App. 1983), *aff'd sub nom. Ex parte Lovett*, 450 So.2d 116 (Ala. 1984), which, as appellant pointed out, Juris. Stat., at 12, are merely exemplars of cases in which the court below occasionally states that it will not decide questions "improperly" pre-

sented but proceeds to decide those questions after indicating that they were improperly presented.

Appellee also cites, Motion, at 8, three cases in support of its jurisdictional argument which were decided not by the court below but by Alabama's intermediate appellate court. At issue here, however, is not the practice of Alabama's intermediate appellate court but the actual practice of the Supreme Court of Alabama. Finally, appellee, Motion, at 8, cites in support of his argument two cases decided more than a half-century ago. Those two cases do not, however, establish that the court below "strictly or regularly" refuses to decide questions raised for the first time in an application for rehearing.[1]

B. Service of Appellant's Brief in Support of Its Application for Rehearing on the Attorney General of Alabama

Appellee, Motion, at 3, 16-17, speculates that the court below could have overruled appellant's application for rehearing because of appellant's asserted failure to comply with Rule 44, Ala. R. App. P. Under that rule, a party challenging the validity of a state statute "shall serve a copy of his written brief . . . on the Attorney General [of Alabama]." This rule was complied with by appellant, as demonstrated by the certificate of service reprinted in the appendix to appellee's Motion, at App. 6. Indeed, the Assistant Attorney General of Alabama has certified that appellant's brief was received by the Office of the Attorney

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[1] One of those two cases, *Cooper* v. *State*, 226 Ala. 288, 147 So. 432 (1933), is itself flatly contrary to an earlier decision, *Gibbons* v. *Gibbons*, 205 Ala. 636, 88 So. 833 (1921), which it did not purport to overrule. The other case relied on by appellee, *State ex rel. Sigsbee* v. *City of Birmingham*, 160 Ala. 196, 48 So. 843 (1908), is itself contrary to a case in the court below decided two and one-half months later. *State ex rel. Tubbs* v. *White*, 160 Ala. 168, 174, 49 So. 78, 81 (1909).

General on March 8, 1986, one day after it had been served on the Attorney General and appellee. *Id.*[2]

On close inspection, appellee's argument is that because the certificate of service filed with appellant's brief in support of its application for rehearing used the word "parties" and because the separate certificate of service expressly naming the Attorney General of Alabama was not attached to that brief, the court below was not aware of appellant's actual compliance with Rule 44 and *could* have assumed non-compliance by appellant. Appellee does not, of course, cite to any case in which the court below has held actual non-compliance with Rule 44—failure to serve a brief on the Attorney General—as being a bar to its consideration of questions covered by Rule 44. Appellee's argument that the court below might have refused to entertain appellant's challenge to § 12-22-72 notwithstanding that the Attorney General was served as required by Rule 44 is nothing more than far-fetched speculation founded on the disingenuity of appellee in characterizing documents which appellee has himself put before this Court.[3]

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[2] Appellee, Motion, at 17, appears to attempt to impugn the integrity of appellant's counsel in the court below and the integrity of the Assistant Attorney General of Alabama by reference to the certificate of service "allegedly served upon the Attorney General of Alabama" and the statement "whether or not" the application for rehearing was served on the Attorney General. For that reason, a copy of this Reply Memorandum is being served on the Attorney General of Alabama for any response which the Office of the Attorney General may deem appropriate.

[3] As is obvious from Rule 44, which has as its counterpart Rule 28.4(c) of the Rules of this Court, the purpose of requiring service on the Attorney General is to ensure that that official has the opportunity to present a defense of a challenged statute. As this Court is well aware, the Attorney General of Alabama has previously demonstrated a profound disinterest in defending § 12-22-72 in this Court, having failed to do so at the jurisdictional and merits stages in *Aetna Life Ins. Co.* v. *Lavoie*, No. 84-1601 (Apr. 22, 1986), 106 S.Ct. 1580 (1986), and *Burlington Northern R. Co.* v. *Woods*, No. 85-1088 (*cert. granted* Mar. 24, 1986).

C. Appellee's Reliance on this Court's Denial of Certiorari in *Illinois Central Gulf R. Co.* v. *Coleman*

Appellee, Motion at 16 & 25, relies on this Court's denial of certiorari in *Illinois Central Gulf R. Co.* v. *Coleman*, No. 85-695 (*cert. denied* May 5, 1986), for the proposition that appellant's challenge to § 12-22-72 in its brief in support of its application for rehearing was untimely. In *Illinois Central*, the petitioner presented to this Court a facial challenge to § 12-22-72 which was identical to the challenges to § 12-22-72 in *Aetna Life Insurance Co.* v. *Lavoie*, No. 84-1601 (Apr. 22, 1986), 106 S. Ct. 1580 (1986), and in this appeal. *See* Pet. for Cert. of Illinois Central Gulf R. Co., at i & 4-5.

This Court, after apparently holding that petition pending its decision in *Aetna*, denied the petition on May 5, 1986. If, as appellee asserts, Motion, at 16 n.3, appellant had raised its challenge to § 12-22-72 in the court below "in a manner indistinguishable from the challenge to the same statute raised by petitioner in *Illinois Central*," appellee's reliance on this Court's denial of certiorari in *Illinois Central* might be of some assistance to appellee even though a denial of certiorari—in contrast to the dismissal of an appeal for want of jurisdiction—cannot be interpreted as a statement by this Court respecting its jurisdiction over a case.

In fact, and as this Court is aware, the challenge to § 12-22-72 presented to this Court by the petitioner in *Illinois Central* had never been presented to the Supreme Court of Alabama. *See* Brief of Respondent Coleman in Opposition to Petition for a Writ of Certiorari to the Supreme Court of Alabama, at 4-5.[4]

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[4] It is noteworthy that from the time respondent Coleman's categorical assertions regarding the failure of the petitioner to present its challenge to § 12-22-72 to the Supreme Court of Alabama were filed with this Court on November 25, 1985 until this Court's denial of certiorari on May 5, 1986, no reply to the respondent's assertions was filed by the petitioner.

Thus, contrary to appellee's submission, this case is not like *Illinois Central*, but is instead in essentially the same jurisdictional posture in this Court as *Treadwell Ford, Inc.* v. *Campbell*, No. 85-1799 (appeal docketed May 7, 1986), and other cases on this Court's docket which raise challenges to the appeal penalty statues of Alabama or Mississippi as well as to excessive punitive damage awards. *See* Juris. Stat., at 22-23 n.13. This appeal should, therefore, be acted upon in a manner consistent with the appeal in *Treadwell*.[5]

Respectfully submitted,

September 15, 1986

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[5] Appellee, Motion, at 20-21, also argues that the record in this case does not adequately present the Excessive Fines Clause issue because the court below did not determine how much of the total $125,000 judgment constituted punitive damages. However, appellant's Excessive Fines Clause argument can be, as pointed out in its Juris. Stat., at 18-19 n.11, decided by this Court on the basis of the lowest possible figure which could be attributed to punitive damages based on appellee's own submissions to the court below. Thus, appellee's argument on this point is misplaced.